APPENDIX A

METROPOLITAN EDISON COMPANY Original Sheet No. 18
FPC Electric Tariff
Original Volume No. 1

RESALE POWER SERVICE
TEMPORARY SURCHARGE FOR RECOVERY OF FUEL COSTS THAT WOULD NOT BE RECOVERED BY THE FUEL CLAUSE EFFECTIVE JANUARY 1, 1976

A temporary surcharge shall be applied to each Kilowatt-hour (KWH) supplied under this tariff for the purpose of recovering the fuel costs incurred prior to and recoverable after December 31, 1975 under the fuel clause effective through that date but not recoverable under the fuel clause effective January 1, 1976. This temporary surcharge is to apply to the KWH of all monthly bills rendered in the twelve consecutive months after the effective date of the surcharge, except that the surcharge shall terminate when the amount to be recovered, $435,307 after application of the "L" factor but excluding any applicable gross receipts taxes, has been billed. If, in the twelfth month, the full amount has not been recovered, the surcharge will be adjusted to recover the remaining balance.

This surcharge shall be applied in accordance with the formula set forth below and shall be computed to the nearest one-thousandth of 1 mill.

$$\text{Surcharge} = 1.500 \text{ mills per KWH} \times L \times \frac{1}{1-T}$$

Where:

"L" is a factor for adjustment of losses to the delivery voltage. The "L" factor is 0.93 for delivery at transmission voltages and is 0.97 for delivery at distribution voltages.

1 is a factor for recovery of any applicable Pennsylvania Gross Receipts Tax; "T" being the currently effective Pennsylvania Gross Receipts Tax Rate.

METROPOLITAN EDISON COMPANY

SUPPLEMENT TO EXHIBIT B

RESALE POWER SERVICE
TEMPORARY SURCHARGE FOR RECOVERY OF FUEL COSTS THAT WOULD NOT BE RECOVERED BY THE FUEL CLAUSE EFFECTIVE JANUARY 1, 1976

A temporary surcharge shall be applied to each Kilowatt-hour (KWH) of supplemental service supplied under this tariff for the purpose of recovering the fuel costs incurred prior to and recoverable after December 31, 1975 under the fuel clause effective through that date but not recoverable under the fuel clause effective January 1, 1976. This temporary surcharge is to apply to the KWH of all monthly bills rendered in the nine consecutive months after the effective date of the surcharge except that the surcharge shall terminate when the amount to be recovered, $84,419 after application of the "L" factor but excluding any applicable gross receipts taxes, has been billed. If, in the ninth month, the full amount has not been recovered, the surcharge will be adjusted to recover the remaining balance.

This surcharge shall be applied in accordance with the formula set forth below and shall be computed to the nearest one-thousandth of 1 mill.

$$\text{Surcharge} = 1.500 \text{ mills per KWH} \times L \times \frac{1}{1-T}$$

Where:

"L" is a factor for adjustment of losses to the delivery voltage. The "L" factor is 0.97 for delivery at distribution voltages.

1 is a factor for recovery of any applicable Pennsylvania Gross Receipts Tax; "T" being the currently effective Pennsylvania Gross Receipts Tax Rate.

PENNSYLVANIA ELECTRIC COMPANY Original Sheet No. 16
FPC Electric Tariff
Original Volume No. 1

RESALE POWER SERVICE
TEMPORARY ADDITIONAL CHARGE FOR RECOVERY OF FUEL COSTS THAT WOULD NOT BE RECOVERED BY THE FUEL CLAUSE EFFECTIVE FEBRUARY 26, 1976

A temporary additional charge shall be applied to each Kilowatt-hour (KWH) supplied under this tariff for the purpose of recovering the fuel costs incurred through and recoverable after February 25, 1976 under the fuel clause effective through that date but not recoverable under the fuel clause or base rates effective February 26, 1976. This temporary charge is to apply to the KWH of all monthly bills rendered in the twelve consecutive months after its effective date except that it shall terminate when the amount to be recovered, $330,622 after application of the "L" factor but excluding any applicable gross receipts taxes, has been billed. If, in the twelfth month, the full amount has not been recovered, the charge will be adjusted to recover the remaining balance.

This charge shall be applied in accordance with the formula set forth below and shall be computed to the nearest one-thousandth of 1 mill.

$$\text{Temporary charge} = 1.800 \text{ mills per KWH} \times L \times \frac{1}{1-T}$$

Where:

"L" is a factor for adjustment of losses to the delivery voltage. The "L" factor is 0.98 for delivery at distribution voltages.

1 is a factor for recovery of any applicable Pennsylvania Gross Receipts Tax; "T" being the currently effective Pennsylvania Gross Receipts Tax Rate.

PENNSYLVANIA ELECTRIC COMPANY

SUPPLEMENT TO EXHIBIT B

RESALE SUPPLEMENTAL POWER
TEMPORARY ADDITIONAL CHARGE FOR RECOVERY OF FUEL COSTS THAT WOULD NOT BE RECOVERED BY THE FUEL CLAUSE EFFECTIVE FEBRUARY 26, 1976

A temporary charge shall be applied to each Kilowatt-hour (KWH) of supplemental service for the purpose of recovering the fuel costs incurred through and recoverable after February 25, 1976 under the fuel clause effective through that date but not recoverable under the fuel clause or base rates effective February 26, 1976. This temporary charge is to apply to the KWH of all monthly bills rendered in the twelve consecutive months after its effective date except that it shall terminate when the amounts to be recovered, $1,088,067, after application of the "L" factor but excluding any applicable gross receipts taxes, has been billed. If, in the twelfth month, the full amount has not been received, the charge will be adjusted to recover the remaining balance.

This charge shall be applied in accordance with the formula set forth below and shall be computed to the nearest one-thousandth of 1 mill.

$$\text{Temporary charge} = 2.700 \text{ mills per KWH} \times L \times \frac{1}{1-T}$$

Where:

"L" is a factor for adjustment of losses to the delivery voltage. The "L" factor is 0.98 for delivery at distribution voltages.

1 is a factor for recovery of any applicable Pennsylvania Gross Receipts Tax; "T" being the currently effective Pennsylvania Gross Receipts Tax Rate.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1329 September Term, 1978

PENNSYLVANIA ELECTRIC COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Intervenor

AND CONSOLIDATED CASE NO. 78-1330

BEFORE: Tamm and MacKinnon, Circuit Judges; and Pratt*, District Judge, United States District for the District of Columbia

ORDER

Upon consideration of petitioners' (Pennsylvania Electric Company and Metropolitan Edison Company) petition for rehearing, it is

ORDERED, by the Court, that petitioners' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

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*Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: DON S. SMITH, Acting Chairman;
MATTHEW HOLDEN, JR., and
GEORGE R. HALL.

Metropolitan Edison Company **Docket No. ER76-209**
ER76-492

ORDER DENYING PROPOSED FUEL ADJUSTMENT CLAUSE SURCHARGE

(Issued December 19, 1977)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg., 46267 (September 15, 1977), the Federal Power Commission[1] ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically

[1] The "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

transferred to the FERC by Section 402(a) (1) or 402(a) (2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR____, provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above-mentioned authorities.

The Presiding Administrative Law Judge (Judge) in his initial decision, issued February 15, 1977, denied Metropolitan Edison Company's (ME) request for a fuel adjustment clause surcharge. The factual and procedural background are accurately set out in the Judge's initial decision and need not be restated here.

For the reasons stated in the companion order, Order Denying Proposed Fuel Adjustment Clause Surcharge (*Pennsylvania Electric Company,* Docket No. ER76-607), issued today, we are hereby denying the proposed fuel adjustment clause surcharge of ME. The points in this proceeding are in all relevant respects the same as those raised in the Pennsylvania Electric Company proceeding and are answered by us in the above-referenced order.

The Commission finds:

(1) Consistent with our discussion herein, ME's proposed fuel adjustment clause surcharge should be rejected.

(2) The Initial Decision of February 15, 1977, should be approved.

The Commission orders:

(A) ME's proposed fuel adjustment clause surcharge is hereby rejected.

(B) The Initial Decision of February 15, 1977, is hereby affirmed.

(C) Within 75 days, ME shall refund to its customers all amounts, if any, collected in excess of those which would have been payable under the rates and charges approved in this proceeding, together with interest at a rate of nine percent per annum from the date of payment to ME to the date of refund.

(D) Within fifteen days after refunds have been made ME shall file with the Commission a compliance report showing monthly billing determinants and revenues under prior, present, and adjudicated rates; monthly adjudicated rate increase, monthly rate refund, and the monthly interest computation, together with the summary of such information for the total refund period. A copy of such report shall also be furnished to each state commission within whose jurisdiction the wholesale customer distributes and sells electric energy at retail.

By the commission
(S E A L)

KENNETH F. PLUMB,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: CHARLES B. CURTIS, Chairman; DON S. SMITH, GEORGIANA SHELDON, MATTHEW HOLDEN, JR., and GEORGE R. HALL.

Metropolitan Edison Company } **Docket No. ER76-209**
ER76-492

ORDER DENYING APPLICATION FOR REHEARING AND MOTION FOR STAY

(Issued February 13, 1978)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg., 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically transferred to the FERC by Section 402(a)(1) or 402(a)(2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR____, provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above-mentioned authorities.

On January 17, 1978, Metropolitan Edison Company (MET-ED) filed an Application For Rehearing and Motion For Stay. MET-ED asks that the FERC reverse its Order Denying Proposed Fuel Adjustment Clause Surcharge, issued December 19, 1977. MET-ED also asks, that if the FERC does not reverse its December 19, 1977 order, that the FERC stay MET-ED's refund obligations pursuant to that December 19, 1977 order pending judicial review. Finally, MET-ED asks that if the FERC denies its Motion For Stay and if the Court of Appeals overturns the FERC, that the FERC state that MET-ED can institute a rate surcharge to recoup, with interest, the amount it refunds.

As to MET-ED's Application For Rehearing, we find that MET-ED presents no new facts or legal principles which warrant any modification of our December 19, 1977 order.

As to MET-ED's Motion For Stay, we hereby deny that motion for the reasons stated in our Order Denying Stay (*Jersey Central Power & Light Company,* Docket No. ER76-813), issued January 20, 1978. The points raised by MET-ED's Motion For Stay are in all relevant respects the same as those raised by Jersey Central's Motion For Stay and are answered by us in the above-referenced order.

Should the Commission's decision eventually be overturned on appeal, the Court, or the Commission, would be empowered to order MET-ED to be placed in the same position it would have been had the Commission approved the fuel

adjustment clause surcharge provision as originally filed. This would include reinstitution of the proposed fuel adjustment clause surcharge provision and a provision permitting MET-ED to recover interest on the amounts at issue.[1]

The Commission finds:

MET-ED's Application For Rehearing And Motion For Stay filed on January 17, 1978, should be denied.

The Commission orders:

MET-ED's Application For Rehearing And Motion For Stay filed on January 17, 1978, are hereby denied.

By the Commission.
(S E A L)

KENNETH F. PLUMB,
Secretary.

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[1] *Maine Public Service Company,* Docket No. E-8264, issued November 9, 1977; *Public Service Company of New Hampshire,* Docket No. ER76-285, issued October 7, 1977; *Boston Edison Company,* Docket No. ER77-558, *et al.,* issued September 15, 1977.

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: DON S. SMITH, Acting Chairman;
MATTHEW HOLDEN, JR., and
GEORGE R. HALL.

Pennsylvania Electric Company } **Docket No. ER76-607**

ORDER DENYING PROPOSED FUEL ADJUSTMENT CLAUSE SURCHARGE

(Issued December 19, 1977)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission[1] ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically

[1] The "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

transferred to the FERC by Section 402(a) (1) or 402(a) (2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR____, provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

NATURE OF PROCEEDING

On April 8, 1976, Pennsylvania Electric Company (Penelec) tendered for filing revisions to certain rate schedules[2] designed to recover, through temporary surcharges, allegedly unbilled fuel costs incurred from November 1, 1975 through February 25, 1976. By this filing Penelec sought to place into effect a temporary surcharge of 1.8 mills per kilowatt-hour to recover $330,662 for service to the 12 all-requirements tariff customers and a temporary surcharge of 2.7 mills per kilowatt-hour to recover $1,088,067 for service to Allegheny Electric Cooperative, Inc. (Allegheny), its supplemental power contract customer. The surcharge would be applied only until the respective amounts, plus applicable gross receipts taxes paid by Penelec, are recovered. The surcharges would collect the claimed amounts within approximately 12 months in the case of the tariff customers and 10 months in the case of Allegheny. Penelec states that, absent approval of the surcharge, these amounts would remain uncollected because Penelec revised its

[2] (1) Original Sheet No. 16 to F.P.C. Electric Tariff, Original Volume No. 1, applicable to six investor-owned electric utilities—Waterford Electric Light Co., Wellsboro Electric Co., Elkland Electric Co., Rockingham Electric Co., Windber Electric Co., and West Penn Power Co., (at Lobo Station)—and to the Boroughs of Berlin, East Conemaugh, Hooversville, Smethport, Summerhill and Girard, Pennsylvania; and (2) a supplement to Exhibit B of Penelec's Wheeling and Supplemental Power Agreement with Allegheny Electric Cooperative, Inc.

fuel clause effective February 26, 1976, pursuant to a Commission order issued December 24, 1975, in Docket No. ER76-301.[3] Penelec contends that the amount in question would have been recovered in March through June of 1976 under the superseded fuel clause, but are not recoverable under the new fuel adjustment clause (fuel clause or FAC) or the new base rates unless and until fuel costs return to at or below the original FAC base period cost.

On May 3, 1976, a joint petition to intervene was filed by Allegheny and the Boroughs of Berlin, East Conemaugh, Hooversville, Smethport, Summerhill and Girard, Pennsylvania (Allegheny and the Boroughs being hereinafter collectively referred to as "Customers"). Customers alleged, among other things, that the surcharge would result in double recovery of the fuel charges which Penelec claimed would not be recovered, and that the surcharge would constitute a retroactive increase in the rates previously charged by Penelec. Customers further moved that the Commission reject the rate schedule revisions tendered for filing in this proceeding.

By order issued May 7, 1976, the Commission suspended the operation of the fuel cost surcharges for five months, or until October 8, 1976, when they were allowed to become effective, subject to refund. The Commission also granted Customers' petition to intervene and directed that the matter be set for hearing.

On March 22, 1977, the Presiding Administrative Law Judge (Judge) issued his initial decision (ID) denying the proposed surcharges and finding them to be unjust, unreasonable, and otherwise unlawful. The Judge further states that he knows of no valid theory upon which Penelec can be permitted to receive the proposed surcharges. The Judge notes that out-of-

[3] This order accepted for filing, subject to refund, Penelec's proposed general rate increase applicable to Allegheny and the tariff customers, filed November 26, 1975, in Docket No. ER76-301, including the revised fuel adjustment clause.

date factors in Penelec's fuel clauses[4] are at the root of Penelec's problem and suggests that Penelec file a "no-lag" fuel clause *i.e.*, a fuel clause more designed to recover truly current costs. The Judge points out that the Commission's regulations make no provision for an interim "make-up" surcharge of the kind herein proposed.

The Fuel Clause Regulation and Penelec's Fuel Clauses

Section 35.14 of the Commission's Regulations authorizes the utilization of fuel adjustment clauses. That part of Section 35.14 directly germane to the issue in this proceeding reads as follows:

> (a) Fuel adjustment clauses which are not in conformity with the principles set out below are not in the public interest. These regulations contemplate that the filing of proposed rate schedules which embody fuel clauses failing to conform to the following principles may result in suspension of those parts of such rate schedules:
>
> (1) The fuel clause shall be of the form that provides for periodic adjustment per kwh of sales equal to the difference between the fuel cost per kwh of sales in the base period and in the current period:
>
> $$\text{Adjustment Factor} = \frac{Fm}{Sm} - \frac{Fb}{Sb}$$
>
> Where: "F" is the expense of fossil and nuclear fuel in the base (b) and current (m) periods; and "S" is the kwh sales in the sales in the base and current periods, all as defined below.
>
> (2) Fuel costs (F) shall be the cost of;

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[4] Both the superseded fuel adjustment clause and the new fuel adjustment clause which became effective February 26, 1976 contain the identical lag provision which specifies that "current period" fuel costs "are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month". These costs are then applied to the kilowatt hours for the billing month.

(i) Fossil and nuclear fuel *consumed* in the utility's own plants, and the utility's share of fossil and nuclear fuel *consumed* in jointly owned or leased plants.

* * *

The Judge in this proceeding summarized Penelec's problem with respect to the above regulation as follows:

> Penelec's fuel clauses, prior and subsequent to the revision effective February 26, 1976, are substantially identical in form, although the FAC base period unit cost $\frac{(Fb)}{Sb}$ was increased from 4.745 mills per kwh to 12.086 mills per kwh. Both the original and revised clauses provide that the current fuel expense and current kwh sales factors for the ratio $\frac{(Fm)}{Sm}$ "are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month." This provision is the root of Penelec's difficulty: by unqualifiedly defining the "current period" factors as, in effect, the average of those experienced three, four and five months earlier than those existing during the true current period—i.e., the billing month—it has, like several other utilities, devised a clause under which it is mathematically impossible to recover the cumulative excess of the cost of fuel per kwh in the true current period over that in the substantially earlier "current period" as defined, until the unit cost per kwh decreases to or below the point of the original FAC base cost per kwh, and stays there long enough to recover the number of dollars unrecovered by reason of the built-in lag. The number of dollars unrecovered is a function of kwh sales and unit fuel cost per kwh. With the sales trend line generally expected to rise, and the fuel cost per kwh unlikely to return to the 1972 level of Penelec's original FAC

base period cost, the possibility that Penelec will at any future time be made completely whole under its existing fuel clause seems remote. (ID slip at pp 3-4).

DISCUSSION

The issue in this proceeding is whether or not Penelec should be permitted to fully recover (through the application of a temporary surcharge) past fuel costs which Penelec claims are not recoverable due to the lag inherent in its fuel adjustment clause design.

Penelec filed a brief on exceptions urging that the initial decision issued on March 22, 1977, rejecting the surcharge be reversed. Penelec claims that it has always intended the fuel adjustment clause to recover actual past fuel costs. Penelec contends that the temporary surcharge is intended as a *substitute for* the superseded fuel clause to complete recovery of fuel costs incurred from November, 1975 through February 25, 1976, but not recovered in billings under the old fuel clause due to the lag between months used to determine "current" costs, for billing purposes, and the month during which current services are being billed. Penelec states that it is fully aware of *Public Service Company of New Hampshire,* Docket No. ER76-285, Opinion No. 790, issued March 22, 1977, and that it believes Opinion No. 790 to be unlawful in that it violates the Commission's regulations (Section 35.14) that fuel clauses recover actual fuel costs.

Both Staff and Customers in their briefs opposing exceptions claim that the issues in this proceeding have already been resolved by Opinion 790. Indeed, Customers urge expedited consideration based on the identity of the issue raised here and in Opinion No. 790.

We can see no valid reason why the surcharge at issue here should be treated differently than the surcharge that was denied in Opinion No. 790. The surcharge of Penelec here has to be

denied as retroactive ratemaking under the analysis of Opinion No. 790. Further, while the facts here and in Opinion No. 790 are substantially similar in almost all important respects, there is one difference which makes Penelec's case even weaker. Under the facts of Opinion No. 790, the alleged undercollection by Public Service Company of New Hampshire (PSNH) was caused by terminating the lag provision and going to current month fuel costs, while with Penelec the lag provision remained unchanged and the alleged undercollection was caused by a change in the base fuel costs.[5] Thus, PSNH would be unable to make up in subsequent periods any underrecoveries of fuel costs incurred in the period prior to the change (elimination of the two month lag provision). In other words, PSNH would not be able to recover all of its fuel costs incurred during November and December, 1975, in the billings for January and February, 1976, as it would have collected under the old fuel clause. Penelec, on the other hand, retaining the same lag provision, will not have this problem. The Judge in this case explained this (ID slip at p. 4) as follows:

> The ultimate effect of the lag is not affected by the revision of the fuel clause to increase the base period unit fuel cost to value in the approximate neighborhood of current costs and sales, accompanied by an equivalent increase in base energy rates. Theoretically the collections in a given month are put on a truly current basis to the extent of the increase in base energy rates; but since the fuel clause retains its arbitrary definition of "current period," actual collections in a billing period are automatically adjusted to unit costs computed over a period up to five months

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[5] Penelec is arguing, in effect, that the base rates recover for current costs, while the fuel adjustment clause recovers for actual past fuel costs. This, of course, is erroneous as pointed out by Staff witness Tindal who stated that Penelec has failed to recognize "... that the basic energy rates to AEC and wholesale tariff customers recoup fuel costs not collected by means of the respective fuel clauses ..." (Tr. 106).

> earlier, so *that the total rate per kwh in the billing month is the same as it would have been had the base energy rates and fuel clause base not been revised.* The "fuel cost adjustment" will be smaller, as of any given time, and may be negative (as it actually has been under Penelec's new FAC base) instead of positive, because it is made against a higher base. *The amount of money collected, from increased base energy rates plus fuel adjustment charges, will be the same.* (Footnote ommitted) (emphasis supplied).

The Commission in Opinion No. 790, *supra,* recognized that where there is no change in the lag provision of the fuel adjustment clause, there is not even an equitable justification for the imposition of a surcharge:

> Had PSNH maintained its old system of a two month lag the problem of a surcharge would never have arisen. PSNH would have consistently received current month revenues based on the costs incurred during the second preceding month. While PSNH may consider itself to be, under this method, two months behind in collecting revenue under the fuel adjustment clause, they are no more behind than is any utility which collects current revenues based on costs incurred during a past test period. (Slip op. at p. 13).

Penelec contends that it should recover its actual fuel costs in order to be made whole. While fuel adjustment clauses are generally intended to recover actual costs, they must be designed in such a manner as to produce that result. If fuel adjustment clauses are designed to recover in current billing months, costs which are indexed to those which are incurred in

prior months, there will almost inevitably be some mismatch[6] between fuel costs incurred associated with actual current month sales and fuel cost recoveries (or revenues) associated with those sales. Penelec, of course, has the option of designing its fuel clause so as to produce a match of billing month fuel costs with billing month fuel cost recoveries if it chooses to do so. Should Penelec elect to adopt a "no-lag" fuel clause design, it should be recognized that it would not eliminate any unrecovered fuel expenses heretofore accumulated, but it would prevent further build-ups of unrecovered fuel costs.[7] The Judge spoke of this rate design problem when he stated:

> [T]here is no merit in Penelec's claim that its present difficulty is caused by the Commission's requirement, if such there was, that it up-date its FAC base period cost. On the contrary, when Penelec revised its clause to up-date the base, it continued to use the same out-of-date factors that it had employed in its original clause; that is, the same

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[6] The Commission recognized this in Opinion No. 633, *New England Power Co.*, 48 FPC 899,908-9 (1972), where it states:

> We would observe .... that while every fuel adjustment clause should be designed to produce as nearly as practicable a mirror image of the cost of fuel upon the price of energy which is delivered by an electric utility, we must expect ripples in that reflection. *Because of the time factor involved in gathering and assimilating data* expressing the number of dollars spent for gallons of oil or tons of coal in terms of dollars per kilowatt-hour, and mailing and collecting the resulting billings, *there must be some imprecision in matching fuel expense dollars with delivered energy revenue dollars for any given date or any given period of time.* (Emphasis supplied).

[7] The net build-up in fuel costs not recovered, as reflected by the record in this proceeding, are the result of both the lag which is inherent in the Company's fuel adjustment clauses and a situation in which fuel costs have steadily increased over the periods involved. It should be recognized, however, that should Penelec's fuel costs begin to decline over a period of time, the lag present in its fuel clause would operate to recover fuel-related revenues in current months in excess of the fuel costs incurred in making such current month sales.

> procedure that caused the present build-up of unrecovered costs, which would inevitably cause the same condition to occur again (even if Penelec were permitted its catch-up surcharge at this time), unless there were no trend in future fuel costs. (ID slip at p. 5).

The purpose of a fuel adjustment clause is to allow a utility to pass through to its customers, without the necessity for a complete rate filing, the changes in fuel cost it experiences. Fuel adjustment clauses are authorized by the Commission as part of a utility's rate structure and are permitted to enable a utility to keep its fuel-related recoveries reasonably in line with its fuel costs. However, this Commission never contemplated that fuel adjustment clauses were to relieve utilities from all risks of doing business. Further, imposition of the proposed surcharge here would be a violation of the filed rate doctrine since a utility's rates must be applied only in accordance with its rate schedules on file with this Commission.[8] Here, of course, the fuel adjustment clauses are part of Penelec's filed rates. It should also be noted that while the charge under the fuel clause may change from month to month, the formula used to compute that charge remains the same. "Thus, it is the fuel adjustment formula, not the monthly fuel adjustment factors derived from the increased (decreased) cost of fuel, which constitutes a part of the rates."[9] The fuel adjustment clause of Penelec here does not have any provision which would allow any deviation from the fuel adjustment formula. Penelec is in effect seeking a retroactive adjustment of that filed rate formula.

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[8] *In Montana-Dakota Utilities Company* v. *Northwestern Public Service Company,* 341 U.S. 246, 251 (1951) the Supreme Court stated a public utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission."

[9] *Electric and Water Plant Board of the City of Frankfort, Kentucky, et al. Kentucky Utilities Company,* Opinion No. 760 (April 29, 1976) (Slip op. at p. 15).

During the period the old fuel adjustment clause was in effect each customer was billed monthly according to the rate calculated in accordance with the fuel adjustment formula then in effect. After each customer had paid its bill, Penelec collected everything it was entitled to receive under the then existing rate schedule. It may not now retroactively collect rates to make up for deficiencies in that formula. As the Supreme Court stated in *F.P.C.* v. *Tennessee Gas Transmission Company,* 371 U.S. 145, 153 (1962):

> The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its loses where its filed rate is found to be inadequate.

The Commission in Opinion No. 790, *supra*, held that the proposed fuel surcharges in that proceeding would constitute retroactive ratemaking and stated as follows:

> During the thirty-six months the superseded fuel clause was in effect each customer was billed monthly based on the rate determined by the fuel adjustment formula then in effect. After a customer had paid that bill the company had received everything it was entitled to receive under the then existing rate schedule. The fact that this rate schedule may not have adequately compensated the company for its costs incurred at that time *does not permit us to retroactively increase that rate.* It is well established that the Federal Power Commission has no authority to order reparations and can only set rates for the future.[10] (Slip op. at p. 12) (emphasis supplied)

One further point regarding Penelec's intent with respect to its fuel clauses should be noted. While Penelec states that it has

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[10] *F.P.C.* v. *Hope Natural Gas Company* 320 U.S. 591, 618 (1944); *State Corporation Commission of Kansas* v. *F.P.C.,* 215 F.2d 176, 184 (8th Cir. 1954).

always been its intention that the fuel adjustment clauses recover past fuel costs, Penelec began billing under its fuel clauses when they first became effective. Thus, under Penelec's theory, the effect of the fuel clause would be to charge customers at the start of fuel clause billings for costs based on a period of time before there was a fuel clause. Penelec, in its brief on exceptions, calls this a "remote piece of evidence" and points to its offer to offset the amount of the requested surcharge by the amount Penelec collected from the Customers based on charges derived from costs prior to the initial effective date of its fuel adjustment clause. This *post hoc* rationalization is not persuasive. As the Judge noted, the facts here support Staff's argument that Penelec deliberately used (in its fuel cost adjustment clauses) past fuel costs as a "proxy" for current costs. (ID slip at p. 6).

Penelec tries to further support its position by analogizing the fuel adjustment clause treatment, with Commission treatment of Purchased Gas Adjustment Clauses. The Commission stated in Opinion No. 790, *supra,* that this analogy is not appropriate:

> PSNH's reliance on the alleged similarity between fuel adjustment clauses and purchased gas cost adjustment provisions is inapposite. PGA adjustments differ from fuel adjustment clauses in several respects. PGA adjustments are not automatically passed through and included in the customer's rates; they must be filed with the Commission. PGA's can be filed no more frequently than semi-annually, while fuel adjustment clauses take effect monthly. PGA clauses are designed to provide for after the fact matching of actual costs and revenues. PGA clauses permitting this matching of actual costs with revenues are included as part of the filed rates under a pipeline's tariff unlike the fuel adjustment clause at issue here. (Slip op. at p. 13).

In summary, the Commission has addressed this almost identical issue in Opinion No. 790. The only factual difference of any consequence (for the purposes of this decision) between this case and opinion No. 790 is one, as discussed above, that makes Penelec's case even weaker. The legal arguments raised in this proceeding were disposed of in Opinion No. 790. Accordingly, the precedent of Opinion No. 790 must govern the outcome here. The legal reasoning which supports that opinion is equally applicable here and Penelec's proposed surcharge must be denied.

The Commission finds:

(1) Consistent with our discussion herein, Penelec's proposed fuel adjustment clause surcharge should be rejected.

(2) The Initial Decision of March 22, 1977, should be affirmed.

The Commission orders:

(A) Penelec's proposed fuel adjustment clause surcharge is hereby rejected.

(B) The Initial Decision of March 22, 1977, is hereby affirmed.

(C) Within 75 days, Penelec shall refund to its customers all amounts, if any, collected in excess of those which would have been payable under the rates and charges approved in this proceeding, together with interest at a rate of nine percent per annum from the date of payment to Penelec to the date of refund.

(D) Within fifteen days after refunds have been made Penelec shall file with the Commission a compliance report showing monthly billing determinants and revenues under prior, present, and adjudicated rates; monthly adjudicated rate increase, monthly rate refund, and the monthly interest computation, together with the summary of such information for the

total refund period. A copy of such report shall also be furnished to each state commission within whose jurisdiction the wholesale customer distributes and sells electric energy at retail.

By the Commission.
(S E A L)

KENNETH F. PLUMB,
Secretary.

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: CHARLES B. CURTIS, Chairman; DON S. SMITH, GEORGIANA SHELDON, MATTHEW HOLDEN, JR., and GEORGE R. HALL.

Pennsylvania Electric Company } **Docket No. ER76-607**

ORDER DENYING APPLICATION FOR REHEARING AND MOTION FOR STAY

(Issued February 13, 1978)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically transferred to the FERC by Section 402(a)(1) or 402(a)(2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR , provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

On January 17, 1978, Pennsylvania Electric Company (Penelec) filed an Application for Rehearing And Motion For Stay. Penelec asks that the FERC reverse its Order Denying Proposed Fuel Adjustment Clause Surcharge, issued December 19, 1977. Penelec also asks, that if the FERC does not reverse its December 19, 1977 order, that the FERC stay Penelec's refund obligations pursuant to that December 19, 1977 order pending judicial review. Finally, Penelec asks that if the FERC denies its Motion For Stay and if the Court of Appeals overturns the FERC, that the FERC state that Penelec can institute a rate surcharge to recoup, with interest, the amount it refunds.

As to Penelec's Application For Rehearing, we find that Penelec presents no new facts or legal principles which warrant any modification of our December 19, 1977 order.

As to Penelec's Motion For Stay, we hereby deny that motion for the reasons stated in our Order Denying Stay (*Jersey Central Power & Light Company*, Docket No. ER76-813), issued January 20, 1978. The points raised by Penelec's Motion For Stay are in all relevant respects the same as those raised by Jersey Central's Motion For Stay and are answered by us in the above referenced order.

Should the Commission's decision eventually be overturned on appeal, the Court, or the Commission, would be empowered to order Penelec to be placed in the same position it would have been had the Commission, approved the fuel adjustment clause surcharge provision as originally filed. This would include reinstitution of the proposed fuel adjustment

clause surcharge provision and a provision permitting Penelec to recover interest on the amounts at issue.[1]

The Commission finds:

Penelec's Application For Rehearing And Motion For Stay filed on January 17, 1978, should be denied.

The Commission orders:

Penelec's Application For Rehearing And Motion For Stay filed on January 17, 1978, are hereby denied.

By the Commission.
(S E A L)

KENNETH F. PLUMB,
Secretary

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[1] *Maine Public Service Company,* Docket No. E-8264, issued November 9, 1977; *Public Service Company of New Hampshire,* Docket No. ER76-285, issued October 7, 1977; *Boston Edison Company,* Docket No. ER77-558, *et al.,* issued September 15, 1977.